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Examiner: D. Nguyen

Group Art Unit: 2828

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PETITION UNDER 37 C.F.R. § 1.181 FOR NEW OFFICE ACTION

This is a Petition under 37 C.F.R. § 1.181 for a new Office Action to replace the Office Action mailed May 7, 2003.

While it is not believed that a fee is required for consideration of this Petition, should a fee be required the Commissioner is hereby authorized to charge any such fee to Deposit Account 06-1205.

FACTS

(1) On February 25, 2003, a first Office Action in the subject application was mailed which restricted examination of the application to one of two groups of claims. A copy of the Office Action is attached as Exhibit A.

(2) On March 25, 2003, Petitioners filed a Response To Restriction Requirement which elected a group of claims for prosecution on the merits and presented arguments traversing the restriction requirement. A copy of the Response is attached as Exhibit B.

(3) On May 7, 2003, a first Office Action on the merits of the application was mailed which withdrew the non-elected group of claims from consideration. However, the Office Action did not respond to the traversal arguments presented in Petitioners' Response and made no further reference to the restriction requirement. A copy of the Office Action is attached as Exhibit C.

(4) On June 4, 2003, Petitioners' undersigned representative contacted the Examiner responsible for the subject application by telephone to request a new Office Action containing the Examiner's response to Petitioners' traversal arguments. The Examiner referred the matter to his Supervisor.

(5) On June 10, 2003, the Examiner's Supervisor contacted Petitioners' undersigned representative by telephone to discuss Petitioners' request for a new Office Action. The Supervisor denied the request and stated that he believed that both the restriction requirement and the May 7th Office Action were proper. An Interview Summary memorializing the telephone call with the Supervisor is attached as Exhibit D.

ARGUMENT

(6) Petitioners respectfully submit that a new Office Action in the subject application is necessary for the following reasons. First, the May 7th Office Action does not comply with the procedure set forth in MPEP § 821.01. Second, the Interview Summary contains comments which raise questions concerning the restriction requirement and therefore requires clarification.

(7) When a restriction requirement is traversed, the requirement should be reconsidered by the Examiner. If the Examiner maintains the restriction requirement, the requirement should be repeated and made final in the next Office Action. The Examiner should also respond to the arguments made in support of traversal. See MPEP § 821.01.

(8) The May 7th Office Action, the first Office Action following Petitioners' Response To Restriction Requirement, did not make the restriction requirement final and did not respond to the traversal arguments set forth in the Response. In fact, with the exception of withdrawing the non-elected claims, the Office Action contains no mention of either the restriction requirement or any of Petitioners' traversal arguments. Accordingly, the May 7th Office Action is not believed to be in compliance with MPEP § 821.01 and therefore incomplete.

(9) The Interview Summary appears to introduce a new aspect to the original restriction requirement. Specifically, the Interview Summary refers Petitioners to the figures in the application and states that "[e]lection should be made based on the figures of the invention." It is unclear to Petitioners whether these comments are intended

to constitute a new requirement based on the figures or whether they are to provide additional grounds for the current requirement. Regardless of the Supervisor's intent, the comments raise questions concerning the current restriction requirement that require clarification.

(10) Wherefore, granting of this Petition and directing the Examiner to provide a new Office Action are respectfully requested. It is respectfully requested that the new Office Action clearly set forth the grounds for the restriction requirement and respond to Petitioners' traversal arguments in compliance with MPEP § 821.01. Petitioners also respectfully request that the due date for response be reset to the mailing date of the new Office Action.

Petitioners' undersigned attorney may be reached in our Costa Mesa, California office at (714) 540-8700. All correspondence should continue to be directed to our below-listed address.

Respectfully submitted,



Attorney for Petitioners

Registration No. 50,957

FITZPATRICK, CELLA, HARPER & SCINTO
30 Rockefeller Plaza
New York, New York 10112-2200
Facsimile: (212) 218-2200

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